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Sex, Lies and Litigation

16th Annual Convocation addresses sexual harassment on the job

An issue of sweeping national significance and deep individual distress was the focus of UB Law School's 16th Annual Alumni Convocation.

Presented on Saturday, March 7, the convocation addressed the topic "Sex and Power in the Workplace: The Expanding Law of Civil Rights and Sexual Harassment Affecting You and Your Clients."

The convocation committee switched to the sexual harassment topic at the last minute, in October, said Phillip Brothman '62, who chaired the committee with Paul J. Suozzi '79. Prompting the change was the highly publicized Senate confirmation hearings for Clarence Thomas and the lurid allegations made against him by Oklahoma law professor Anita Hill.

A total of 172 registrants gathered at the Center for Tomorrow to hear discussions by four experts.

UB Law Professor Lucinda Finley began with an overview of sexual harassment claims, asking the question: Why is sexual harassment considered a form of employment discrimination?

The answer, as she put it, is that offensive sexual attention is rooted in a deep-seated male anxiety about women's presence in the workplace. Harassment, she said, is an effort to "keep them in their place," to send a signal that "You don't belong here. You're not one of us."

Finley said the courts have clear-

"I can't tell you the number of women who have said to me: 'I never thought that was sexual harassment. I never knew that was actionable.'"

ly recognized "quid pro quo" sexual harassment, in which the harasser demands sex as a condition of employment or in exchange for a promotion, as actionable.

On shakier legal ground, she said, is the area of "hostile or offensive environment" — the type of attention Anita Hill described. This can range from sexual conduct in words or actions to the display of pin-up pictures.

Finley said such conduct can be downright hostile. She described one case in which the harasser scrawled violent graffiti on pornographic pictures and repeatedly left them on the victim's desk.

"Hostile environment" cases, she said, have become controversial for two reasons. First, there's the question of whether such conduct is protected under the First Amendment. Second, such cases point up the dif-

fering perceptions of men and women about what's harmful and what's trivial. Finley said it's not unusual for the man to say, "I didn't do anything," and the woman to say, "Yes, you did," and for both to be quite sincere.

Sexual harassment, Finley said, can erode a victim's self-esteem and ability to do the job. It also can damage her chances of success later on in her career.

The courts, she said, have applied the "reasonable person" rule in determining whether a work environment is "severe and pervasive" enough to constitute a claim of "hostile environment."

But she added a caveat: The sense in the law is that a reasonable woman must complain about any harassment immediately, "without regard for her job security, credibility and future job prospects."

The law, Finley said wryly, "still expects a reasonable woman to behave much like a reasonable man. I call it the Henry Higgins standard — 'Why can't a woman be more like a man?'"

The next speaker, Carol E. Heckman, is a litigation partner with the Buffalo law firm Lippes, Kaminsky, Silverstin, Mathias & Wexler. She suggested some important questions attorneys should ask if a client is claiming sexual harassment on the job.

These include questions about the nature of the alleged harassment. Did it involve jokes? Offensive language? Touching? The Equal Employment

Opportunity Commission, she notes, considers even a single unwelcome advance as evidence of a hostile environment.

Is the behavior persistent and open?

What is the position of the alleged harasser? The Supreme Court, Heckman said, has ruled that "standard agency principles" apply. If the harasser is a member of top management — an officer or a director — then the company is liable for the behavior. But if the harasser is a middle-management supervisor, it's less clear whether the company is responsible.

Have there been lost wages, emotional distress, physical problems?

When did the harassment occur, and is it ongoing? Heckman noted that

time limits for filing claims are very short. Complaints must be submitted to the EEOC within 300 days of the incident, she said, and the limit for filing charges with the state Division of Human Rights is one year.

Heckman also said lawyers should be frank with clients about the drawbacks to litigation. It takes a long time, she said; the accuser's character will be scrutinized; there may be publicity; filing a complaint may affect other job opportunities. She also pointed out that the EEOC and the Division of Human Rights accept pro se cases, in which no attorney is required.

Discussing remedies available to victims of sexual harassment, Heckman said amendments made last year

to Title VII "make very major changes in this area." Specifically, she said, the amendments allow plaintiffs to recover compensatory and punitive damages. Previously, they could recover only back pay, reinstatement and similar actual-loss damages.

Sheila J. Nickson, former assistant to the president and director of affirmative action at Buffalo State College, gave the attendees a quick version of the presentation she gives to managers on avoiding and redressing sexual harassment.

"I can't tell you the number of women who have said to me: 'I never thought that was sexual harassment. I never knew that was actionable,'" Nickson said.

So it's up to a company's top

*Standing left to right:
Carol E. Heckman, Sheila J.
Nickson and Robert A. Doren.
Seated: Lucinda Finley,
Phillip Brothman.*



Mr. Secretary

*Longtime Alumni Association officer
Robert C. Schaus receives Jaeckle Award*

Robert C. Schaus '53, recipient of the Jaeckle Award for 1992, was honored at the award ceremony as a man of integrity, energy and unshakable character.

Schaus, recently retired from his family law firm in Buffalo, has served as secretary of the UB Law Alumni Association for 30 years. He was presented with the coveted award — UB Law School's highest honor — by university President William Greiner following the Convocation program on March 7.

"What words would I use to describe Bob Schaus?" Greiner asked. "One is family — his own, and the larger family of the Law School and the Law Alumni Association. His dedication to that has been absolutely astounding.

"The other word is fidelity. You take a word that would epitomize Bob Schaus, and it's fidelity, loyalty, commitment. In his own way he's been Mr. UB Law School, Mr. Law Alumni Association for so long."

"In my wildest dreams, I never expected this," Schaus responded.

"I should not be receiving this award, I should be giving it. I am the luckiest guy in the world. For 30 years I've been in the catbird seat."

Schaus was just eight years out of law school when he was asked in 1961 by then Dean Jacob D. Hyman to help revitalize the Law Alumni Association in preparation for the Law School's 75th anniversary celebration.

A quarter-century later, Schaus



Alumni Association President Jean C. Powers '79 congratulates Jaeckle Award winner Robert C. Schaus '53.

made a major contribution to another anniversary celebration — the 100th — by co-writing, with James Arnone '85, a comprehensive history of the Law School. The book is expected to be published this summer.

"For well over 30 years, Bob has given completely and unselfishly of himself to the Association and to the school," said Dean David B. Fil-

varoff. "Much of what is good about the Law School today would not exist but for the help, friendship and effort of Bob Schaus."

Justice M. Dolores Denman, last year's Jaeckle Award winner and presiding justice of the Appellate Division, State Supreme Court, Fourth Department, grew up in the same North Buffalo neighborhood as

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Schaus. She recalled that they went to the same church and shared many of the same friends. He played basketball and football at Canisius High School, and "I remember him in those days as sort of a high school hero," she said.

Denman also recounted Schaus' continuing love of athletics — from daily racquetball matches to marathon running (for many years he ran home from the office, a distance of eight miles) to mountain biking.

"The alumni are very indebted to you, Bob," Denman said to the honoree. "You're the kind of lawyer, the kind of alumnus we hope everyone would be."

Schaus and his wife, Joan, have eight children, three of whom — John '83, Richard '85 and Barbara '90 — are UB Law School graduates.

In accepting the Jaeckle Award, Schaus pointed with pride to three areas in which the Alumni Association has contributed to the school and the professional life of alumni practitioners:

- * Building up the Association's annual dinner, to the point where it now attracts more than 400 people.

- * Establishing and running a successful and highly regarded annual convocation.

- * Hiring of an executive director for the Association, and publication of the award-winning magazine UB Law Forum.

Among his next goals for the Association are hiring a coordinator for alumni reunions and arranging for publication of an annual yearbook. He cited the historical value such yearbooks have for archivists and other researchers.

Named for UB alumnus Edwin F. Jaeckle, Class of 1915, the Jaeckle Award is given annually to an individual who has distinguished himself or herself and has made significant contributions to the Law School and the legal profession. ■

management, she said, to make it clear what constitutes sexual harassment, and state that it won't be tolerated.

Nickson said managers who think they don't have a problem may just be blind to it. "There's limited awareness at the top," she said. In addition, "targets" of sexual harassment often don't speak up, out of fear of retribution, ignorance of company policy, or distrust of the complaint-handling process.

But employers, Nickson said, can't promise confidentiality to a complainant. They have to ensure due process for the person being accused, and that means interviewing him about the charge. The best an employer can offer, she said, is discretion and fairness.

"It's easier to write these rules than to apply them," Nickson said.

She pointed out that some organizational cultures support sexual harassment — they may allow swearing and extensive after-hours socializing, or they may tolerate improper behavior on business trips. Nickson told of a young man in admissions who had charged sexual harassment after a female supervisor "chased him around the hotel" during a business trip. "It's not about sex, it's about power," Nickson said.

She concluded with some simple tests for deciding whether an action constitutes sexual harassment.

"Would you say it in front of your mate?" said asked. "Would you say it if it would appear on the front page of the newspaper? Would you say it to a member of the same sex in exactly the same way?"

"And why does it need to be said in the course of business?"

The final speaker came at the problem from the other side. Robert A. Doren, who represents management interests with the Buffalo law firm Flaherty, Cohen, Grande,

Randazzo & Doren, spoke of the need for companies to practice "damage control" in a sexual harassment case.

"In all these cases you will have credibility problems," Doren said of his management clients. "How do you go about interviewing witnesses?"

It's useful, Doren said, to try to establish a limited attorney-client privilege with potential witnesses, generally fellow employees of the accuser. This is accomplished, he said, by having the company offer the services of an attorney — the same one it's using — to employees during the questioning. Often the employees agree, Doren said, and the attorney-client privilege that is established gives the attorney access to EEOC affidavits that would otherwise be off-limits.

"The absolute worst thing an employer can do is to have a poor investigation," Doren said. "My experience is that juries won't tolerate that. ... You really have to take these investigations seriously."

If a sexual harassment case is headed for trial, Doren said, select the jury carefully. "Consider their perspective," he said. "Many will have a relative who has been sexually harassed. What was the outcome? What defenses were raised?"

In addition, he advised attorneys not to attack the complainant based on her previous romantic history, citing the case of a former topless dancer and nude model who sued Penthouse magazine publisher Bob Guccione for sexual harassment — and won.

Finally, Doren said, recognize that just because a claim is made doesn't mean it's true. "Not every harassment that's alleged is meritorious," he said. "I have had some cases, believe it or not, that were pure garbage. ... The fact that there may have been some contact between two people doesn't necessarily mean there has been sexual harassment." ■